

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEBORAH COONEY,
Plaintiff,
v.

No. C 12-6466 CW
ORDER GRANTING
DEFENDANTS'
MOTIONS TO DISMISS
(Docket Nos. 26,
28)

THE CALIFORNIA PUBLIC UTILITIES
COMMISSION, et al.,
Defendants.

Defendants the State of California, the California Public Utilities Commission (CPUC), CPUC President Michael Peevey and California Attorney General Kamala Harris (the State Defendants) and Defendant Itron, Inc. have filed motions to dismiss in this case.¹ Plaintiff opposes the motions as to Defendants Peevey, Harris and Itron. Acknowledging that her claims against the CPUC and the State of California are barred by the Eleventh Amendment,

¹ Plaintiff has not filed a certificate of service, indicating that she has effectively served Defendant San Diego Gas and Electric. Moreover, in Plaintiff's motion for entry of default as to San Diego Gas and Electric (SDG&E), Plaintiff states that she did not attempt to serve the complaint until July 19, 2013. See Docket No. 51. This action commenced on December 20, 2012, more than 120 days before Plaintiff attempted to serve the complaint. Accordingly, the Court orders Plaintiff to show cause why her claims against SDG&E should not be dismissed for failure to prosecute. See Fed. R. Civ. P. 4(m). If Plaintiff does not respond to this order to show cause within fourteen days of the date of this order, her claims will be dismissed.

1 Plaintiff has filed a request that the Court dismiss her claims
2 against the CPUC and the State of California without prejudice to
3 refiling in state court. Having considered the parties' papers,
4 the Court GRANTS Plaintiff's request that the Court dismiss her
5 claims against the CPUC and the State of California (Docket No.
6 36), GRANTS the State Defendants' motion to dismiss (Docket No.
7 26) and GRANTS Itron's motion to dismiss (Docket No. 28).

8 BACKGROUND

9 This case relates to Plaintiff's claims that she was injured
10 by radio waves released by smart meters installed on her house and
11 in her neighborhood. Plaintiff alleges that, as a result of these
12 injuries, she has been "forced to take refuge in the National
13 Radio Quiet Zone in Green Bank, WV" where she "sleeps in a cabin
14 without electricity and can tolerate being in electricity for only
15 a few hours a day." Complaint ¶ 1. Plaintiff alleges that
16 Defendants violated bans on human experimentation, fraudulently
17 received federal funds, violated federal laws regulating
18 pollutants, caused her personal injury, violated her civil rights,
19 violated her constitutional rights under the First, Fourth, Fifth,
20 Ninth, Tenth and Fourteenth amendments, committed battery and
21 defrauded her. Plaintiff also alleges a defective product
22 liability claim against Defendant Itron.

23 Plaintiff seeks over \$120 million in damages, but states that
24 her damages will be reduced to \$20 million if injunctive relief is
25 granted such that she is able to return to live in California. In
26 addition to monetary damages, Plaintiff seeks declaratory relief
27 and an injunction requiring the replacement of all smart grid
28 technology with the original analog equipment "until such time as

1 a safe, reliable, and efficacious Smart Grid can be designed,
2 manufactured, procured, properly tested for health and safety, and
3 implemented; or until the people, through a referendum or through
4 their elected representatives, decide to discard, disband, and
5 dismantle the Smart Grid program." Complaint ¶ 125.

6 DISCUSSION

7 I. State Law Claims and Claims for Damages Against Attorney 8 General Harris and CPUC President Peevey

9 Defendants Harris and Peevey argue that the claims against
10 them are barred on several grounds. First, any claims for damages
11 are barred by the Eleventh Amendment, which bars damages actions
12 against state actors acting in their official capacity. Will v.
13 Michigan Dep't of State Police, 491 U.S. 58, 71 (1989); Flint v.
14 Dennison, 488 F.3d 816, 824-25 (9th Cir. 2007). Moreover, the
15 Eleventh Amendment bars any state law claims asserted against
16 Defendants Harris and Peevey. Pennhurst State School & Hosp. v.
17 Halderman, 465 U.S. 89, 121 (1984). The Court grants State
18 Defendants' motion to dismiss on these grounds and bars any claims
19 against Harris and Peevey for state law claims or for money
20 damages. Because amendment would be futile, dismissal is without
21 leave to amend.

22 II. Claims for Injunctive and Declaratory Relief Against 23 Defendants Harris and Peevey

24 A. Defendant Harris

25 State Defendants next argue that the Eleventh Amendment also
26 bars claims for prospective injunctive relief against Defendant
27 Harris. As stated above, the Eleventh Amendment generally bars
28 federal lawsuits against a state. However, Ex parte Young
provides an exception for "actions for prospective declaratory or

1 injunctive relief against state officers in their official
2 capacities for their alleged violations of federal law." 209 U.S.
3 123, 155-56 (1908).

4 State Defendants argue that the Ex parte Young exception to
5 the Eleventh Amendment does not apply to Defendant Harris because
6 she has no connection to the implementation of the Smart Grid. Ex
7 parte Young requires that the state official sued "must have some
8 connection with the enforcement of the act." Id. at 157. The
9 California Attorney General has only a general constitutional duty
10 "to see that the laws of the state are uniformly and adequately
11 enforced." Cal. Const. art. V, § 13.

12 Plaintiff counters that she wrote letters to Defendant
13 Harris, notifying her of Plaintiff's concerns with the Smart Grid.
14 Plaintiff asserts, "Since the Plaintiff did send a letter
15 describing the circumstances to Defendant Harris personally, and
16 Defendant Harris was and is the chief enforcer of the law in the
17 State, responsible for ensuring that all State agencies and
18 employees comply with law, then she had a reasonable duty to
19 protect the Plaintiff." Plaintiff's Opposition, Docket No. 33 at
20 7. However, Plaintiff provides no authority for this proposition
21 and the Court is aware of none.

22 Indeed, the Ninth Circuit has held that the connection "must
23 be fairly direct; a generalized duty to enforce state law or
24 general supervisory power over the persons responsible for
25 enforcing the challenged provision will not subject an official to
26 suit." Los Angeles County Bar Ass'n v. March Fong Eu, 979 F.2d
27 697, 704 (9th Cir. 1992). Here, Defendant Harris has only a
28 generalized duty to enforce state law. She does not have any

1 specific authority over the Smart Grid. Accordingly, Plaintiff's
2 claims for prospective injunctive and declaratory relief against
3 Defendant Harris are dismissed. Because amendment would be
4 futile, the dismissal is without leave to amend.

5 B. Defendant Peevey

6 State Defendants argue that Defendant Peevey is entitled to
7 legislative immunity because the CPUC "is not an ordinary
8 administrative agency, but a constitutional body with broad
9 legislative and judicial powers." Docket No. 34 at 6 (quoting
10 Wise v. Pac. Gas & Elec. Co., 77 Cal App. 4th 287, 300 (1999)).
11 The Supreme Court has held that "state and regional legislators
12 are entitled to absolute immunity from liability under § 1983 for
13 their legislative activities." Bogan v. Scott-Harris, 523 U.S.
14 44, 49 (1998). "Absolute legislative immunity attaches to all
15 actions taken 'in the sphere of legitimate legislative activity.'" Id.
16 at 54 (quoting Tenney v. Brandhove, 341 U.S. 367, 376 (1951)).

17 Here, Plaintiff is challenging Defendant Peevey's involvement
18 in the implementation of the Smart Grid. For example, Plaintiff's
19 primary contention is that "Defendants recklessly approved,
20 mandated, facilitated, or allowed the Smart Meter roll out without
21 conducting adequate research as to the health effects of Smart
22 Meter radiation" and that they continue to proceed with the Smart
23 Meter roll out "after being presented with reliable research,
24 scientific and empirical evidence proving the detrimental health
25 effects of Smart Meter and similar radiation on humans."
26 Complaint ¶¶ 25, 26. Such decisions are "discretionary,
27 policymaking decision[s]" typically granted legislative immunity.
28 Bogan, 523 U.S. at 55. Plaintiff correctly notes that purely

1 ministerial acts are not protected under legislative immunity.
2 Notwithstanding Plaintiff's unsupported contention that "[a]ll of
3 the misconduct described in the Complaint is non-discretionary,
4 administrative, or ministerial in nature," Plaintiff challenges
5 discretionary legislative activity. Plaintiff's Opposition at 11.
6 Accordingly, the Court finds that Defendant Peevey is entitled to
7 legislative immunity and dismisses Plaintiff's claims against him.
8 Because amendment would be futile, the dismissal is without leave
9 to amend.

10 III. Claims Against Defendant Itron

11 A. State Law Claims

12 Defendant Itron argues that Plaintiff's action is barred by
13 both state and federal law. Itron first notes that the California
14 legislature authorized the CPUC to adopt rulemaking related to
15 advanced metering technologies for the Smart Grid. Cal. Pub.
16 Util. Code §§ 8360, 8362. Further, the CPUC has authorized the
17 implementation of the Smart Grid and specifically authorized SDG&E
18 to purchase smart meters from Defendant Itron. Accordingly,
19 Defendant Itron argues that the Court lacks jurisdiction over
20 Plaintiff's case challenging the implementation of the Smart Grid
21 and the installation of Itron smart meters. Defendant Itron
22 relies on California Public Utilities Code § 1759, which provides,

23 No court of this state, except the Supreme Court and
24 the court of appeal, to the extent specified in this
25 article, shall have jurisdiction to review, reverse,
26 correct, or annul any order or decision of the
27 commission or to suspend or delay the execution or
28 operation thereof, or to enjoin, restrain, or
interfere with the commission in the performance of
its official duties, as provided by law and the rules
of court.

1 Cal. Pub. Util. Code § 1759. However, § 2106 of the California
2 Public Utility Code provides,

3 Any public utility which does, causes to be done, or
4 permits any act, matter, or thing prohibited or declared
5 unlawful, or which omits to do any act, matter, or thing
6 required to be done, either by the Constitution, any law
7 of this State, or any order or decision of the
8 commission, shall be liable to the persons or
9 corporations affected thereby for all loss, damages, or
injury caused thereby or resulting therefrom. . . . An
action to recover such loss, damage, or injury may be
brought in any court of competent jurisdiction by any
corporation or person.

10 Cal. Pub. Util. Code § 2106.

11 The California Supreme Court has held that § 1759 bars
12 private actions against utilities where the relief granted would
13 undermine a regulatory regime established by the CPUC. San Diego
14 Gas & Elec. Co. v. Superior Court (Covalt), 13 Cal. 4th 893, 902-
15 03 (1996). Moreover, § 2106 is limited to "those situations in
16 which an award of damages would not hinder or frustrate the
17 commission's declared supervisory and regulatory policies."
18 Waters v. Pacific Tel. Co., 12 Cal. 3d 1, 4 (1974). The
19 California Supreme Court has applied a three-part test to resolve
20 any conflict between § 1759 and § 2106. To determine whether an
21 action is barred by § 1759, the California courts ask:
22 "(1) whether the PUC had the authority to adopt a regulatory
23 policy on the subject matter of the litigation; (2) whether the
24 PUC had exercised that authority; and (3) whether action in the
25 case before the court would hinder or interfere with the PUC's
26 exercise of regulatory authority." Kairy v. SuperShuttle
27 International, 660 F.3d 1146, 1150 (9th Cir. 2011) (citing Covalt,
28 13 Cal. 4th at 923-35).

1 Here, the State Legislature has directed the CPUC to
2 "determine the requirements for a smart grid deployment plan
3 consistent with Section 8360 and federal law" and to implement the
4 smart grid "in a manner that does not compromise customer or
5 worker safety." Cal. Pub. Util. Code §§ 8362, 8363. Based on
6 that authority, the CPUC has, among other things, specifically
7 authorized SDG&E to purchase Defendant Itron's product.
8 Accordingly, a finding that Defendant Itron's products are unsafe
9 under state law would undermine the CPUC's policy decision that
10 installation of Itron's products as part of SDG&E's Smart Grid was
11 consistent with the State Legislature's directive safely to
12 implement the smart grid.

13 Moreover, California Public Utilities Code § 1702 creates a
14 process by which any person may file a complaint before the CPUC
15 regarding any rule or decision applicable to a public utility.
16 Review of decisions on such complaints rests with the California
17 Supreme Court and the California courts of appeal. Cal. Pub.
18 Util. Code §§ 1703, 1759. Indeed, a group challenged the safety
19 of the Smart Meters installed by Pacific Gas and Electric (PG&E),
20 which was resolved by the CPUC. See CPUC Decision 12-05-007 (May
21 10, 2012); CPUC Decision 12-06-017 (June 7, 2012); CPUC Decision
22 10-12-001 (December 12, 2010). Plaintiff has not filed such a
23 complaint.

24 Defendant Itron argues that § 1759 prohibits Plaintiff's
25 entire action. However, Defendant Itron does not cite any cases
26 in which a court has dismissed federal causes of action based on
27 § 1759, and the Court is aware of none. Cf. Kairy, 660 F.3d at
28 1148 (addressing "whether a federal district court lacks subject

1 matter jurisdiction to determine whether passenger stage
2 corporation drivers are employees or independent contractors under
3 California law); Nwabueze v. AT&T Inc., 2011 U.S. Dist. LEXIS
4 8506, *33 (N.D. Cal.) (addressing contention that the "plaintiffs'
5 state law claims should be dismissed because they are within the
6 exclusive jurisdiction of the [CPUC]"). Accordingly, the Court
7 will dismiss Plaintiff's state law claims against Defendant Itron
8 for lack of subject matter jurisdiction. Because amendment would
9 be futile, the dismissal is without leave to amend.

10 B. Federal Claims

11 Defendant Itron further argues that Plaintiff has failed to
12 state a federal claim. On a motion under Rule 12(b)(6) for
13 failure to state a claim, dismissal is appropriate only when the
14 complaint does not give the defendant fair notice of a legally
15 cognizable claim and the grounds on which it rests. Bell Atl.
16 Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering
17 whether the complaint is sufficient to state a claim, the court
18 will take all material allegations as true and construe them in
19 the light most favorable to the plaintiff. NL Indus., Inc. v.
20 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this
21 principle is inapplicable to legal conclusions; "threadbare
22 recitals of the elements of a cause of action, supported by mere
23 conclusory statements," are not taken as true. Ashcroft v. Iqbal,
24 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 555).

25 When granting a motion to dismiss, the court is generally
26 required to grant the plaintiff leave to amend, even if no request
27 to amend the pleading was made, unless amendment would be futile.
28 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911

1 F.2d 242, 246-47 (9th Cir. 1990). In determining whether
 2 amendment would be futile, the court examines whether the
 3 complaint could be amended to cure the defect requiring dismissal
 4 "without contradicting any of the allegations of [the] original
 5 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th
 6 Cir. 1990).

7 Plaintiff alleges two federal claims against Defendant
 8 Itron.² First, she alleges that Defendant Itron has violated
 9 federal prohibitions on human experimentation, citing 45 C.F.R.
 10 part 46 and 42 U.S.C. § 3515b. Section 3515b provides:

11 None of the funds appropriated by this Act or subsequent
 12 Departments of Labor, Health and Human Services, and
 13 Education, and Related Agencies Appropriations Acts
 14 shall be used to pay for any research program or project
 15 or any program, project, or course which is of an
 16 experimental nature, or any other activity involving
 17 human participants, which is determined by the Secretary
 18 or a court of competent jurisdiction to present a danger
 19 to the physical, mental, or emotional well-being of a
 20 participant or subject of such program, project, or
 21 course, without the written, informed consent of each
 22 participant or subject, or a participant's parents or
 23 legal guardian, if such participant or subject is under
 24 eighteen years of age. The Secretary shall adopt
 25 appropriate regulations respecting this section.

26 42 U.S.C. § 3515b. Title 45 C.F.R. part 46 sets out the
 27 Department of Health and Human Services' rules for the "Protection
 28 of Human Subjects" in research "conducted, supported or otherwise

29 ² Plaintiff's complaint also alleges that Defendants
 30 fraudulently received federal funds. However every allegation
 31 related to that claim describes actions by Defendant SDG&E. The
 32 complaint also alleges various constitutional claims, but
 33 Plaintiff clearly states that those claims "appl[y] specifically
 34 to Defendants State, CPUC, Peevey and Harris." Complaint ¶ 80.
 35 Accordingly, the Court finds that these claims were not plead
 36 against Defendant Itron.

1 subject to regulation by any federal department or agency which
2 takes appropriate administrative action to make the policy
3 applicable to such research." 15 C.F.R. § 46.101.

4 Plaintiff asserts that "Defendants did not properly inform
5 Plaintiff or any other California residents that they would be the
6 subjects of a state-wide grand experiment on the health effects of
7 Smart Meter radiation." Complaint ¶ 38. Plaintiff further
8 asserts that "Defendants never followed up or kept records of the
9 health effects that they were supposed to be studying." Id. at
10 ¶ 40. However, there are no allegations to support a finding that
11 the smart meter program was an "experiment" or research project
12 regarding the health effects of radiation. Accordingly, these
13 statutes and regulations are not applicable to Defendants' conduct
14 in this case. The Court dismisses Plaintiff's human
15 experimentation claim. Because amendment would be futile, the
16 dismissal is without leave to amend.

17 Plaintiff next alleges that Defendants violated the Hazardous
18 Substances Labeling Act, which prohibits, among other things,
19 "[t]he introduction or delivery for introduction into interstate
20 commerce of any misbranded hazardous substance or banned hazardous
21 substance." 15 U.S.C. § 1263. Plaintiff bases this claim on her
22 allegation that "radiation from Smart Meter equipment qualifies as
23 a hazardous substance based on its toxicity." Complaint ¶ 67.
24 However, Defendant Itron has not introduced the radio frequency
25 signals into interstate commerce. Rather, it creates Smart
26 Meters, which are sold in interstate commerce. Moreover, the
27 radio frequency signals emitted by Defendant Itron's product are
28 neither a hazardous substance requiring special labeling nor a

1 banned hazardous substance. Indeed, the Hazardous Substances
2 Labeling Act is concerned with items such as "[c]harcoal
3 briquettes and other forms of charcoal in containers for retail
4 sale and intended for cooking or heating," turpentine, fireworks,
5 and products containing chemicals such as formaldehyde, benzene
6 and methyl alcohol. 16 C.F.R. §§ 1500.12-1500.14. Accordingly,
7 the Court finds that Plaintiff has failed to state a claim under
8 the Hazardous Substances Labeling Act. Because amendment would be
9 futile, the dismissal is without leave to amend.

10 CONCLUSION

11 For the foregoing reasons, the Court GRANTS the State
12 Defendants' motion to dismiss (Docket No. 26) and GRANTS Defendant
13 Itron's motion to dismiss (Docket No. 28). In addition, the Court
14 GRANTS Plaintiff's request that the Court dismiss her claims
15 against the CPUC and the State of California (Docket No. 36).

16 IT IS SO ORDERED.

17
18 Dated: 7/15/2014

19 
20 CLAUDIA WILKEN
21 United States District Judge
22
23
24
25
26
27
28